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(Continued)*

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PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Acknowledging, then, that both employers and employees have legally enforceable rights under these collective agreements, both groups are naturally interested in determining the precise effect which the courts will give to the various provisions of their agreements. If they are allowed injunctions in certain cases, will the courts specifically enforce a closed shop agreement? Or will the courts declare provisions for a secondary boycott void? And these are only two of the myriad of questions which arise out of the judicial attempts to construe these contracts. So we now turn to a survey of the interpretations which have been placed upon these agreements.

> "Speaking generally, the tendency of the cases are definitely in the direction of a broad and liberal construction of collective bargaining agreements. * * * Decisions construing the agreements strictly are waning, and can no longer be relied upon as good law in the face of general emphasis upon the beneficial effects of collective bargaining."[85]

Closed Shop Provisions:

One of the most vital problems confronting the courts today is the interpretation to be put upon the stipulation for a closed shop which is found in many collective agreements. This provision has been attacked not only by employers, but also by non-union employees who are unable to obtain work and by rival unions. It has been attacked on the ground that it is contrary to public policy; that it constitutes an unlawful conspiracy and that it violates the anti-trust laws in general. Nonetheless, there has been a growing recognition of the validity of such agreements.[86]

* The first installment of this article appears at 17 WASH. L. REV. 181.

[85] Teller, *supra* note 63, § 169.

[86] Note (1935) 95 A. L. R. 10; F. F. East Co., Inc. v. United Oystermen's Union 19600 et al, *supra* note 84; Christiansen et al. v. Local 680, *supra* note 56; and *In re* Triboro Coach Corp., 104 N. Y. L. J. 807, 3 LABOR CASES ¶ 60,076 (1940).

The courts of the various jurisdictions have not all agreed, however, in their approach to this problem. There is first the factor of the scope and importance of the agreement in the labor market—that is, does the agreement cover all of the possible sources of employment so that one must be a member of the union in order to obtain work, or does the union have as members the greater number of workers in the particular field so that an employer must enter into a contract with the union in order to get men? In some of the cases the courts have concluded that the size of the union is not controlling. Thus, in *F. F. East Co. Inc. v. United Oystermen's Union*,[87] the fact that 95 per cent of the entire industry had signed closed shop agreements with the union was not felt sufficient to make the contract there involved illegal. And in *Farulla v. Ralph A. Freundlick*,[88] an agreement was held not to be illegal *per se* merely because 75 per cent of the employers in the industry, employing 2,000 of the 2,650 workers engaged therein, had entered into collective agreements containing provisions for the closed shop.

However, not all courts have adopted this approach, and occasionally a case will seem to turn upon the scope of the agreement within the particular industry involved. In the *Christiansen case*,[89] the court adopted a rule of presumption to the effect that if the union has negotiated closed shop agreements throughout the entire industry it will be assumed *prima facie* to have established a monopoly, and evidence will have to be introduced in order to justify the agreements. On the other hand, if such provisions merely prevail between one employer, or only a few employers, and the union, then the closed shop provisions will be presumed to be valid.

Occasionally the problem is presented in a more aggravated form, as where a closed shop agreement completely ties up an essential and important industry in an entire community, so that it is impossible for anyone in that locality to obtain work in that industry unless he is or becomes a member of the union. In such circumstances, the agreement has been declared to be void as against public policy, and there would seem to be justification for such a holding in an extreme case of this sort.[90]

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[87] *Supra* note 84.

[88] 152 Misc. 761, 274 N. Y. S. 70 (1934).

[89] Christiansen et al. v. Local 680, *supra* note 56.

[90] Polk v. Cleveland R. Co., 20 Ohio App. 317, 151 N. E. 808 (1925); Connors v. Connolly, 86 Conn. 641, 86 Atl. 600 (1913). In a Note in 24 VA. L. REV. 567 (1938), a New York case, Williams v. Quill, 277 N. Y. 1, 12 N. E. (2d) 547 (1938), is discussed. The case involved a closed shop agreement between the local subway and elevated railway companies and the transport workers' union. The non-union workers complained that this created a monopoly, since it included all the employers who furnished work of that type in the community. The court upheld the agreement since non-union workers could join the union and since it was to the benefit of the employees. The author of the Note felt that this was an extension of the doctrine as applied by the majority of the cases but that it was justifiable

It is also possible for the courts to consider the legality of such closed shop provisions from the standpoint of whether they have the effect of inconveniencing or injuring the employer. Thus in the *F. F. East Co.* case discussed above, the court noted that the plaintiff employer's business had not been inconvenienced or delayed by the closed shop provision in its contract with the defendant union, since it was able to hire non-union workers temporarily if it needed them and get them admitted to the union later. The court found that the union had entered into the agreement in good faith for the benefit of its members and other workers in the industry and therefore sustained the agreement.

Finally, it has been suggested that a distinction should be made in those cases where the union bargaining for a closed shop is also a closed union.[91] There is perhaps less justification for such a closed shop, closed union situation than for the simple closed shop agreement alone, but even in this type of case, if the employer has not been injured through inability to obtain workmen, and if the purpose of the agreement is actually to aid the employees rather than to injure the employer, it would seem difficult to find a basis for denying the validity of the closed shop provision.

The National Labor Relations Board has adhered to the policy of upholding the validity of closed shop agreements, while state legislation has been adopted authorizing the closed shop, and there is a growing feeling that the strike for a closed shop is valid. All of these factors will probably lend support to the contention that agreements containing closed shop provisions are valid.

An interesting problem, collateral to the general question of the validity of the closed shop, arises when the courts are called upon to determine the rights of a workman who has been discharged or is unable to obtain employment because of a closed shop agreement. Has he the right to sue the union for damages on these grounds? The issue is somewhat different than any of those which arise between the employer and the union, since here the employee's right to work has been interfered with.

As long as there is no constitutional right to work—a highly controversial issue in itself—a man who merely finds it difficult to obtain employment, but who has not lost his job as a consequence of the formation or existence of a closed shop agreement, will find it difficult to discover any legal theory to sustain his action, unless it be upon the ground that the closed shop provision constitutes a monopoly or a

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as long as the non-union worker could join the union, because of the importance to the union of the closed shop.

[91] Teller, *supra* note 63, §170. *Also see* Shinsky v. O'Neil, 232 Mass. 99, 121 N. E. 790 (1919), which upheld the closed shop provision but noted that the union was an open union.

restraint upon trade. These rationales have in fact been suggested as possible approaches for the courts, their decision in each case to depend upon whether or not the agreement has actually lessened the plaintiff's opportunity for finding work.[92]

An employee who has actually been discharged from his position because of non-membership in a union having a closed shop contract with his employer can advance a much more persuasive argument, since his contract of employment has been directly interfered with. Such a worker has, in some cases, been able to sustain his claim for damages on the ground, apparently, that such closed shop agreements are void as against public policy.[93] However, not all cases have so held. In *Cusumano v. Schlessinger*[94] . . . the plaintiff non-union employee was discharged by his employer at the instigation of an employers' association, of which the latter was a member, and of the union with which the association had a closed shop contract. The employee then attempted to sue the union on account of his discharge, but the court denied recovery. The grounds upon which the decision was based are not entirely satisfactory, for the court adopted what appears to have been the easiest way out, without actually considering the problem presented. The contract of employment was held to be merely a contract terminable at will, so that the employer had the right to discharge an employee at any time and for any reason. Furthermore, the court felt that, even had the employee been wrongfully discharged, his action against the union would be improper, since the employer is solely responsible for discharging him. Even an employee who has been expelled from a union and then is unable to obtain work because the union has closed shop agreements with the employers in the industry has been held to be unable to obtain relief against the union.[95]

It would seem that a rival union would have even less right to object to the formation of a closed shop agreement between an employer and another union. It is possible that if all the members of this rival union were discharged as a result of such an agreement, they might be allowed to bring suits individually in some jurisdictions, but the union itself could not maintain an action, unless upon the theory of public policy or on the ground that the agreement might result in a monopoly of the labor market. The motive for forming the agreement is sometimes given importance in this type of case, as well as the fact that the members of the plaintiff union have not been discharged from work but are merely unable to obtain employment.[96]

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[92] Witmer, *supra* note 33.

[93] Curran v. Galen, 152 N. Y. 33, 46 N. E. 297 (1897).

[94] 90 Misc. 287, 152 N. Y. S. 1081 (1915). Also see Ryan v. Hayes, 243 Mass. 168, 137 N. E. 344 (1922).

[95] Shinsky v. O'Neil, *supra* note 91.

[96] Hoban v. Dempsey, 217 Mass. 166, 104 N. E. 717 (1914).

Whether or not a closed shop agreement should be sustained in any or all circumstances is solely a question of public policy, a question of balancing the interests of the labor movement against the interests of the public as a whole. It must be admitted that the closed shop agreement is of vital importance to any union group. It is the one certain means of preserving the rights which the union has won for its members. If we approve of collective bargaining and the right of workmen to organize into labor unions, it would seem that we must also approve of their ultimate goal of complete unionization, which can be effected only through the establishment of the closed shop. Much of this discussion is, of course, now foreclosed by the recent decisions under the anti-trust law.[97] Those cases have established, in the federal courts at least, that closed shop agreements are not *per se* violations of the Sherman Act, and it is to be presumed that most of the state courts will adopt a similar attitude.

Seniority Provisions

While the advantage of the labor movement of judicial approval of closed shop provisions in collective labor contracts cannot be denied, seniority rights and their protection are also of great concern to the union and the individual employee, and provisions with respect to seniority usually constitute an important part of such a collective agreement. Very often it will be found that actions involving questions of seniority are brought not only against the employer but against the union as well, for a violation of seniority rights may be occasioned by a change in the agreement between the union and the employer. The result of the action will turn upon the interpretation given to the agreement by the court.

In considering this problem the courts seem willing to rely upon the practical construction placed upon the seniority provisions by the parties concerned, instead of attempting to determine for themselves the purpose of these sections.[98] Furthermore, most courts seem to acknowledge the union's interest in the interpretation of the agreement and therefore recognize its right to intervene in an action, even if not joined as an original party. The union, as representative of its other members, is regarded as having a valid interest in the proper interpretation of the contract.[99]

In the event that an individual employee sues for reinstatement or for recognition of his seniority rights, he is clearly entitled to injunctive

[97] Altho important in themselves they fall outside of the scope of this discussion.

[98] Burton v. Oregon-Washington R. & Nav. Co., 148 Ore. 648, 38 P. (2d) 72 (1934).

[99] McGregor v. Louisville & N. R. Co., 244 Ky. 696, 51 S. W. (2d) 953 (1932).

relief if his rights have actually been denied. The problem arises in determining whether or not his rights have been so disregarded. The normal case is illustrated by *Burton v. Oregon-Washington Ry. & Nav. Co.*[100] in which the plaintiff employee sued for a declaratory judgment as to his seniority rights, due to the consolidation of two divisions of the railroad and the union's agreeing to a new consolidated seniority list which altered the plaintiff's seniority status to his disadvantage. The court denied that the contract had given the plaintiff employee any vested right to seniority and refused the relief prayed for.

> "When plaintiff entered the employment of the company, he was bound to accept the schedule as it came to him, to be read in the light of established practice and interpretation. There could not be an interpretation for one employee and a different interpretation for another. It applied to all employees alike. Any other conclusion would do violence to the purpose and spirit of the collective bargaining agreements."[101]

Similar results have been reached in other cases upon the general theory that the union has the right and power to modify the agreement for the benefit of its entire membership, even though this action may injure the plaintiff individually.[102]

An opposite conclusion has, however, been reached in some cases. Under this view the seniority rights granted by the collective agreement are held to vest in the employee so that they cannot be destroyed or denied by the union or the employer without his consent. Thus in *Lockwood v. Chitwood*[103] an employee sued to restrain the union from interfering with his seniority rights. The court said:

> "Contrary to defendants' contention, seniority rights, when recognized and guaranteed by contract between the employer and the union inure to the benefit of individual employees, and the employee may invoke the equity jurisdiction of the courts if full resort to union tribunals has proved unavailing because of unreasonable construction of union laws or want of good faith on the part of such officers."[104]

It has likewise been recognized that an employee may restrain an interference with his seniority rights by another union.[105] Apparently the courts are more willing to prevent an outside union or another employee from interfering with an employee's seniority status than they are to restrain his own union from modifying the collective agreement by which those rights were originally established.[105a]

[100] *Supra* note 98. *See also,* Donovan v. Travers, 285 Mass. 167, 188 N. E. 705 (1934).

[101] *Supra* note 98, at page 76.

[102] Hartley v. Brotherhood, *supra* note 34; Donovan v. Travers, *supra* note 100.

[103] 185 Okla. 44, 89 P. (2d) 951 (1939). Relief was denied on the facts.

[104] *Supra* note 103, at page 952.

[105] Dooley et al. v. Lehigh Valley R. C., *supra* Note 26. Seniority rights were here compared to unemployment insurance.

[105a] For a general discussion of the problems in connection with seniority provisions, see Note (1941) 41 COL. L. REV. 304.

Covenants Against Dealing With Non-Union Employers

Another very interesting provision which is sometimes found in these collective labor agreements is a covenant by the employer not to trade with other business organizations which are not unionized. Such a provision was interpreted in *Weitzberg v. Dubinsky*,[106] in which a manufacturer of buttons sued to restrain a union and an employers' association from enforcing the following clause in their contract:

> "Members of the association who purchase or cause to be manufactured belts, covered buttons, neckwear, artificial flowers, embroideries, buckles, hemstitching, pleating and tucking on garments, shall deal only with such firms as are in contractual relations with the union.

The defendant union had entered into this agreement with a number of employers' associations, some of the members of which were customers of the plaintiff. The plaintiff had had a contract with the union, but upon its expiration a controversy arose and the execution of a new agreement was delayed. The defendant union threatened to enforce the above provision against the plaintiff, which would have meant a loss of customers, unless the plaintiff became a member of a particular manufacturers' association from which he had earlier resigned. To prevent such action, the plaintiff brought this suit. The court upheld the validity of this clause as a logical and essential part of a collective bargaining agreement and concluded that the fact that it inflicted harm upon the plaintiff was not of legal significance. Futhermore, although it did not regard the agreement as calling for a secondary boycott, it indicated that even if it were so regarded, it would still be upheld as legal under the earlier case of *Goldfinger v. Feintuch*.[106a]

A similar case recently arose in this jurisdiction.[107] The plaintiff company had entered into an agreement with the defendant union which contained a stipulation that:

> "There shall be no goods delivered to or sold at the plant for resale from trucks to persons not in good standing with Local Union No. 524."

The plaintiff, in violation of this contract, continued to sell to the Paddy Kake Bakery Sales Company, which was not unionized. After repeated but unavailing requests that the plaintiff cease dealing with the non-union concern, the union began to picket the plaintiff employer. The court, in an action for damages and injunctive relief, held that this was not a secondary boycott and that there was no attempt to intimidate the plaintiff's employees or customers. It concluded:

> "The parties had the right to enter into the contract which they executed and which by its terms, was still in effect

[106] 173 Misc. 350, 18 N. Y. S. (2d) 97 (1940).

[106a] 276 N. Y. 281, N. E. (2d) 910 (1937).

[107] Marvel Baking Company v. Teamsters' Union Local No. 524, 5 Wn. (2d) 346, 105 P. (2d) 46 (1940).

> up to and including the time of the trial of this action. Respondent does not contend that, at the time the contract was signed, it did not fully understand the meaning of the clause of the contract above quoted. Respondent having breached this provision of its contract, appellants had the right, by lawful methods, to disseminate information to the effect that a dispute existed between respondent and appellant union. The facts that respondent's employees were all members of the union, and that the parties to this action had entered into a contract which was in full force and effect at the time the action was commenced and when the action was tried, distinguish this case from the *Fornili* case and other of our decisions relied upon by respondent."[108]

Such provisions will not be enforced, however, if they run counter to statutory provisions or definite public policy. Thus in the *Keystone Freight Lines* case,[109] the provision that "Members of the union shall not be allowed to handle or haul freight to or from an unfair company" was held not to constitute a defense in an action brought by one motor carrier against another for unfair discrimination in refusing to accept goods for carriage.

But, except in unusual fact situations such as that involved in the *Keystone* case, if the secondary boycott itself is recognized as legal in a given jurisdiction, there seems to be no reason why it may not be expressly provided for in a collective bargaining contract.

Miscellaneous Provisions

Another provision sometimes found in collective bargaining agreements entered into between a union and an employers' association is a stipulation to the effect that there shall only be one agreement within the particular industry, and that with the association which is a party to the given contract.[110] These provisions have usually been sustained on the rationale that the union has an interest in bargaining collectively with only one group and that it is to its advantage to bargain with an employers' association because of the disciplinary force which the latter can exert over its members.[111] The desire of other employers not to be subjected to undercutting of wages by an unfair employer will do much to aid in the enforcement of such conditions.

This same rationale was relied upon to uphold another type of agreement entered into by a jobbers' association, the union, and various contractors in the dress manufacturing industry. The jobbers' association . . . agreed to deal only with those contractors whom they actually needed and who were certified to them in the manner provided in the

[108] *Ibid.* p 358.

[109] Keystone Freight Lines, Inc. v. Pratt Thomas Truck Lines, Inc. (W. D. Okla., 1941) 3 LABOR CASES ¶ 60,254.

[110] *See* American Fur Manufacturers' Assn., Inc. et al. v. Association Fur Coat & Trimming Mfg., Inc., 161 Misc. 246, 291 N. Y. S. 610 (1936). The decision in this case was influenced somewhat by the state anti-trust law.

[111] Teller, *supra* note 63, § 174.

agreement. The contractors were to manufacture exclusively for the jobbers to whom they were certified, and both the jobbers and the contractors were to employ only union men. The contractor who brought this suit to have this provision declared void had been designated to certain jobbers who no longer had enough work to hire him, and other jobbers were unwilling to employ him unless he were designated to them. The court rendered judgment for the defendants on the pleadings and stated:

> "Obviously, in an industry comprised of small units of employers effective collective agreement can be obtained only if the trade union deals with the employers through an association. This method of dealing has the advantage of avoiding a multiplicity of negotiations at every step and enabling a better enforcement of, and respect for, the very collective agreement not alone by the union, but through the discipline which the association exercises upon its individual members."[112]

There are numerous other clauses in the normal collective bargaining agreement which are of great importance in connection with the effort to maintain industrial peace, such as clauses providing means of settling disputes through arbitration and stipulations against strikes and lockouts. Most of these provisions have been upheld, and since it is impossible successfully to analyze all of them here, they will not be discussed.[113]

The Effect of the Anti-Injunction Acts

Today the problem of the validity of the collective bargaining agreement and the means of enforcing it has become more complicated because of the effect of the anti-injunction acts, modeled after the national Norris-LaGuardia Act, and fair labor practices acts similar to the Wagner Act. Although these questions cannot be discussed here in detail, still no consideration of the legality of the collective labor contract would be complete without some reference to them.

In determining whether or not the anti-injunction statutes impinge upon the right of the parties to obtain specific performance of such an agreement, or to restrain a breach thereof, the initial inquiry is whether or not a controversy arising out of a labor agreement is a labor dispute within the meaning of the statutes so that, in the first instance, these enactments can be held to be applicable.

A labor dispute is defined in the majority of the acts in terms similar to the following:

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the

[112] Sainer v. Affiliated Dress Manufacturers, Inc. et al., 168 Misc. 319 5 N. Y. S. (2d) 855, 859 (1938).

[113] The problem of enforcing a union's covenant not to strike has already been discussed. For a case in this jurisdiction which involved an arbitration agreement between the employer and the union, *see* Hegeberg v. New England Fish Co., 7 Wn. (2d) 509, 110 P. (2d) 182 (1941).

> association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."[114]

The question actually becomes one, then, of applying the statutory definition to the facts of a "breach of the agreement" case. Some of the state courts have concluded that a controversy over the terms of the agreement or an attempt to enforce compliance therewith is a labor dispute.[115] The Washington court in the *Marvel Baking Co.* case[116] seems also to accede to this view, although the position is not entirely clear, since a majority of the employees were members of the union which was striking and picketing, and this fact was also relied upon by the court to sustain its position. However the court did state:

> "The *Fornili* case and decisions of this court upon which the same was based hold that no labor dispute exists in cases where a union pickets an employer, when none of the employees belongs to the union which is engaged in the picketing, and where no employee has any dispute with his employer as to the terms and conditions of his employment. *In none of our cases above cited did it appear that the employer had an existing contract of any kind with the union and consequently could be charged with violation of any agreement.*"[117] (italics added)

This case is also of importance since the provision in the contract which was breached did not relate to what are usually referred to as the terms or conditions of employment (and in fact the employees were satisfied with their working conditions), but rather with the employer's refusal to comply with a covenant against trading with an unfair, non-union company. Therefore, it would seem, under the reasoning of this court, that a dispute arising over the breach of any clause in the contract would constitute a labor dispute under the statute. It should be noted, however, that the action was not directly to enforce the agreement, but was, rather, an attempt to recover damages and to enjoin picketing by the union which declared the company unfair because of its breach of the contract.

There is a paucity of federal cases upon this subject, although there are cases which have held that a strike or boycott in violation

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[114] 29 U. S. C. A. § 113 (c).

[115] Greater City Master Plumbers' Assn., Inc. v. Kahme, *supra* note 69. *Also cf.* Foss v. Portland Terminal Co., 287 Fed. 33 (C. C. A. 1st, 1923): Lesaius v. The International Alliance of Theatrical Stage Employees and Motion Picture Operators, etc., 4 LABOR CASES ¶ 60,503 (Penn., 1941). The writers upon the subject seem to feel that such a controversy is a labor dispute. *See* Teller, *supra* note 63 § 177 and 51 HARV. L. REV. 520, *supra* note 79.

[116] *Supra* note 107.

[117] *Ibid,* p. 353.

of the terms of a contract is also a labor dispute and not enjoinable.[118] In *Foss v. Portland Terminal Co.*[119] a similar problem was considered in relation to Section 20 of the Clayton Act. The plaintiff carrier sought to enjoin the calling of a strike by a union contrary to the terms of their collective agreement, which provided for arbitration. The difficulty arose over wages, and before it could be submitted to a conference for settlement the union distributed ballots to determine whether the workers would authorize the calling of a strike unless the management granted immediate reconsideration of the wage reduction and settled the problem of overtime. The court denied the injunction, even though it assumed that the strike would violate the union's contract, and specifically held, *inter alia,* that this was a dispute concerning conditions of labor.

After determining that a labor dispute does exist, it is still necessary to determine whether or not equitable relief by way of injunction will be denied, or whether it is possible to bring the action within one of the exceptions provided for in the act. This was attempted in the *Foss* case, and the employer asserted that the particular circumstances came within the terms "unless necessary to prevent irreparable injury to property or to a property right." The court concluded, however, that the mere fact of quitting work was not the type of injury contemplated by the statute and that the employer had therefore failed to bring himself within the exception.

Under the state acts the problem is simplified because many of them have specific provisions to the effect that the act shall not apply to any case involving a labor dispute which is in disregard of a valid labor agreement. This is true in New York and also in Pennsylvania, and in both states the courts have allowed the employer to obtain an injunction against the union to prevent striking and picketing.[120]

Under the national act, however, there is no such provision, which means that any employer or union seeking equitable relief will have to comply with the general exemptions. It has been suggested that the position of the union will be somewhat simpler than that of the employer. It will be possible for the union to show that the acts of

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[118] Teller, *supra* note 63 § 177, where the author stated that he had found no federal case passing upon the right to obtain specific performance of these agreements as affected by the Anti-Injunction Law.

[119] *Supra* note 115.

[120] Greater City Master Plumbers' Assn., Inc., *supra* note 69, where a New York court enjoined a strike by a union in violation of its agreement. The court apparently felt that the act applied to this type of situation, but that, since it qualified under the exception of "breach of a contract not contrary to public policy," the court had power to grant the injunction. The *Lesauis* Case, *supra* note 115, involved picketing by a rival union, but the court allowed an injunction to protect the existing labor contracts.

the employer in violating the agreement are unlawful or will cause irreparable injury to property, while an employer attempting to restrain a strike in breach of the agreement will have to circumvent the express statutory provision against enjoining strikes.[121]

The problem of the applicability of these statutes cannot be solved merely by a technical determination of the meaning of their terms and a literal enforcement thereof. It can be solved, rather, only upon the basis of the broad general policy of such acts. If specific enforcement of the collective agreement is to be denied, and an injunction to restrain the breach thereof refused, on the ground that a labor dispute is involved within the terms of the statute, then the efficacy of the collective labor agreement will be destroyed. As has already been noted, damages and actions at law afford small compensation for the loss suffered as a result of the breach of such a contract. It is only through equitable relief that the value of the agreement can be fully realized and protected. Therefore, to deny both parties the opportunity of invoking the assistance of equity in maintaining and enforcing these agreements is to render ineffective the collective bargain itself. Such a result is clearly contrary to the general policy of all modern labor legislation, since it is all predicated upon the encouragement of the collective bargain as the most logical method of establishing labor peace.

Furthermore, if the legislative intention in passing the anti-injunction laws is truly ascertained, it will be found that the purpose of such legislation was not to impede the enforcement of collective labor agreements, but to deal with an entirely different phase of labor disputes.[122] These statutes were enacted primarily to prevent employers from resorting to the courts to enjoin strikes for union recognition, for the improvement of working conditions, and for other similar labor objectives. They were not intended to apply to actions brought to enforce the agreements which are the proper culmination of union labor's efforts to gain recognition.

Since the courts apparently feel it necessary to hold that these acts apply even to cases involving controversies arising out of collective agreements, and since it is highly desirable that equitable relief be afforded in such cases, it would seem advisable that these statutes be amended by exempting from their application cases involving the enforcement of collective bargaining agreements.

COLLECTIVE BARGAINING AND THE N. L. R. A.

Assuming that a valid contract has been entered into between a union and an employer, its continued effectiveness now would seem to depend in some degree upon the interpretation of the National Labor

[121] 51 HARV. L. REV. 520, *supra* note 79.
[122] Teller, *supra* note 63, § 177.

Relations Act. If the normal case of a closed shop agreement is considered, the contract having been made between the majority union and the employer, difficulty is encountered upon the employees' changing their affiliation to another union, so that the once dominant labor organization no longer maintains its majority status. Will the employer be compelled to discharge all of his employees in order to carry out his closed shop agreement with the old majority union, or must he begin to bargain with the newly designated representative of his employees? The employer is placed in a very hazardous position, for he faces the possibility, upon one hand, of being sued for breach of contract, and on the other, of being charged with an unfair labor practice.

A fact situation falling within the general problem outlined above was presented to both the Board and the court in *M. & M. Woodworking Co. v. N. L. R. B.*[123] Local No. 2531 of the Carpenters' Union, an A. F. of L. organization, had a contract with the employer which designated it as the bargaining agent. The majority of the members of this local, during the summer of 1937, determined to severe relations with the Carpenters' Union and affiliate with the International Woodworkers of America, C. I. O., whereupon they returned their original charter to the Carpenters' Union. The employer, because of this shift of affiliation by his employees, temporarily shut down his plant. Upon reopening, he rehired only those employees who were members in good standing of the formerly dominant union. The rival union brought an unfair labor practice proceeding, because of the employer's refusal to employ workers unless they were in good standing with Local 2531. The board held that the refusal to hire the discharged workers was an unfair practice. It suggested that it was unnecessary to decide which theory actually applied since the result would be the same either on the theory that the new union was substituted for the old local and took over its obligations and privileges, or under the theory that the contract itself was terminated upon the shift in the membership in the union. However, this decision was reversed by the circuit court, which felt that the employer was justified in this action under the terms of the contract.[123a]

This variance between the approach of the court and that of the Board illustrated by this case represents a fundamental divergence in opinion between the administrative and the judicial interpretations of the act. The approach of the Board had apparently been one of allowing a substitution of the new union for the old. Thus the closed shop provisions would operate in favor of the presently dominant

[123] 6 Decisions and Orders of the N. L. R. B. 372 (1938), reversed in 101 F. (2d) 938 (C. C. A. 9th, 1939).

[123a] The problem was made more difficult because of the question whether the local could withdraw from the national organization in the manner it did.

union. Although this was assumed to be the official position of the Board, law review writers have suggested that the position is not now so definite.[124] But nevertheless the Board's approach has been one of allowing either termination or substitution in this sort of a situation. The courts, on the other hand, have been more impressed with the inviolability of the contractual rights, and thus have applied the normal rules of contracts with apparent disregard of the peculiar nature of the problems confronting them.

The problem becomes even more acute, if the rival union is certified by the National Labor Relations Board as the proper bargaining agency. From the terms of the act itself it would appear that the mere existence of an agreement between the employer and a formerly dominant union would not remove the duty of the Board to certify a new union as representative if it now has a majority, and it is asserted that there has never been a refusal of certification after the initial year of the contract, although during that year the right has been held to be barred.[125] Therefore, it would seem proper for the Board to certify a union as bargaining representative even though an agreement exists between the employer and another union.

This position has not been accepted in New York, under that state's labor relations act, and in the *Triboro Coach Corporation* case,[126] the language of the opinion seemed to deny the right to issue a certificate of representation during the life of a contract.

Once the Board has issued its certification, however, there still remains the question as to its effect upon the prior legal contract. Is that contract automatically terminated, or does it continue with the new union as a party? The New York cases have assumed that the contract must continue between the employer and the old union, and the change in proper bargaining agent cannot alter the contractual

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[124] Note (1942) 51 YALE L. J. 465.

[125] Teller, *supra* note 63, § 177; 51 YALE L. J. 465, *supra* note 124.

See also: In re Mill B. Inc., et al., 40 N. L. R. B. No. 346 April, 1942. (One year contract with an A. F. of L. Union with automatic renewal clause unless sixty day notice of desire to terminate was given. C. I. O., after renewal, petitioned the Board for an investigation and certification of representation. Agreement held a bar. C. I. O. union should have given notice prior to date of automatic renewal.);

In re Simon Bache & Co. and Local 528, Brotherhood of Painters. Decorators and Paper Hangers of America, 39 N. L. R. B. No. 1216, March, 1942. (Contract entered into in October, 1938 and was to remain in effect until December 31, 1943. It had been in effect at least three years at this time. Held no bar to certification.);

In re Robert L. Nelson Co., Inc. v. United Paper Workers Union, Local 292, C. I. O., 39 N. L. R. B. No. 1168, 1942. (A contract with an A. F. of L. union was entered into after notice to the company of C. I. O. Union's claim to majority representation and after preceeding for selection of representative was instituted. Held no bar.) *Also see* Note (1942) 40 MICH. L. REV. 1249.

[126] *In re* Triboro Corporation, 104 N. Y. L. J. 807, 3 LABOR CASES ¶ 60,076 (1940).

duties of the parties to the original contract.[127]

Labarge v. Malone Aluminum Corp.[128] illustrates the reverence with which the courts have treated the employer's obligations. There existed a collective agreement between the employer and the Malone Independent Union, which was valid when made. Subsequent to that time, an election was held and an A. F. of L. union was chosen by the employees as their bargaining agent. This union also made a contract with the employer which operated to the detriment of the Malone Independent Union. This latter group sued to enjoin the breach of its prior collective bargaining contract. It was argued by way of defense that the N. L. R. B. actually had sole jurisdiction of this controversy because it had held an election to determine the representative union. The court dismissed this contention and stated:

> "The initial contract in question, between members of a union and their employer, established property which the court should not surrender to a board whose authority to invalidate them has not been specifically given." [129]

Thereupon the court issued an injunction restraining the enforcement of the new contract and ordering enforcement of the earlier agreement.

The *Triboro Case* presents a similar approach in even more extreme circumstances. There the employer had entered into a valid closed shop agreement with an A. F. of L. union and upon the approach of the date of its termination, a union affiliated with the C. I. O. petitioned the New York Board for an election. But the employer concluded a new contract with the former union despite this petition and despite a Board order calling for an election. The agreement had contained an automatic renewal clause. An election was held after the contract was concluded and the new union was selected as bargaining agent by a majority of the employees. The employer refused to negotiate with it, however, relying upon the prior contract for a closed shop. The board issued a cease and desist order and the company appealed from that order. The courts reversed the Board on the appeal, holding that the contract was valid when made and that since the purpose of the act was to prevent industrial strife, a valid contract could not be overthrown merely on a change of bargaining agent. This case has been interpreted as standing for the proposition that a closed shop clause automatically designates the contracting union as the employees' representative and that this fact can not be altered by an administra-

[127] *Supra* note 126; *also see* Labarge et al. v. Malone Aluminum Corp. et al., 3 LABOR CASES ¶ 60,032 (1940). Teller also feels that there is nothing in the N. L. R. A. which would necessitate a holding that the existing contract is invalidated upon the new certification.

[128] *Supra* note 127.

[129] *Ibid.*

tive notice of the pendency of a representation question.[130]

N. L. R. B. v. Electric Vacuum Co.[131] is a similar holding in relation to the national act. The case arose out of a C. I. O.-A. F. of L. controversy. A written contract had been executed by the A. F. of L. union and the employer. At the same time there was an oral agreement that all new employees should become members of the A. F. of L. union after two weeks probation. Only the old employees were exempt. Both contracts were renewed for one year, and the workers designated the A. F. of L. as their bargaining agent, subject to a thirty day notice of withdrawal. Thereafter, C. I. O. organizers began to obtain memberships for their union. Various difficulties arose, and the A. F. of L. asked the employer to shut down his plant. This was done, following which a new closed shop contract was entered into, and at the reopening of the plant, only A. F. of L. members were rehired. The C. I. O. applied to the N. L. R. B., and the Board found that the employer had discriminated in favor of the A. F. of L. union. Although there was some question raised as to whether the appropriate notice had been given to all the employees of the oral agreement of preferential hiring, the interpretation placed by the court on this provision and on the designation of the A. F. of L. as bargaining representative is the interesting and important fact. The court held that the union members could not terminate their membership during the year except by notice of withdrawal of representation as provided in the agreement.

> "* * * If the one-year term limits the freedom of the employees at will to discard membership in one union for membership in another, the limitation has been freely agreed to by the men themselves, and the right to organize with representatives of their own choosing is curtailed not by the employer, but by their own valid agreement." [132]

The problem is one of great importance not only to employees and employers, but to the public as a whole. The general aim of all recent legislation has been to bring about greater industrial peace; and it has been deemed desirable to have terms of employment definite and certain. There is therefore some validity to the court's position that the contract should continue in effect despite the change in bargaining agent.[133] On the other hand, the Wagner Act aims at flexibility and true representation of the majority of the workers. Therefore it should be possible for them, if dissatisfied, to change their union affiliations. Clearly, it should not be justifiable for one union to enter into a closed shop agreement extending over an indefinite number of years which would effectively preclude any other union's certification as

[130] Note (1942) 51 YALE L. J. 465.
[131] 120 F. (2d) 611 (C. A. A. 6th, 1941).
[132] *Ibid.* p. 616.
[133] Note (1940) 38 MICH. L. REV. 516.

bargaining representative. To insure democratic control of labor organizations, employees must be free to change their representatives.

The rights of the employer must also be considered. If he has a duty to bargain with the union selected by the majority of his workers, then he should be relieved of his contractual duties to any other union with which he may have contracted previously. Also, it must be recognized that there is a great deal of validity in many of the contentions advanced by employers in favor of the continuance of an existing agreement with an old union. Particularly is this true of their arguments against the doctrine of substitution. The employer has entered into a contract with a particular union, relying upon its dependability in carrying out the terms of the agreement. He might have been unwilling to formulate a similar contract with the now majority union. To him, substitution offers no relief, and possibly it may be to his disadvantge. Nor is a complete abrogation of the agreement any more satisfactory, since it destroys any gain which the employer may have obtained in the way of certainty of labor conditions.[134]

The criticism has been made that the courts in resolving this problem have viewed the union as the real party in interest. On that basis, abrogation of the existing contract would require either a dissolution of the old union or a merger into another organization unless an assignment of the contract rights or a novation can be proved. But actually, it is contended, the workers themselves are the real parties in interest, and it is suggested that they be treated as an entity. Therefore, if the workers have won certain rights and advantages while members of an A. F. of L. union, and a majority of them thereafter shift to a C. I. O. union, the entity, i. e., the majority of the workers, should be allowed to retain those preferences and rights.[135]

This suggestion is valid to an extent, since actually it is the employees who are to be benefited by these agreements. But it is not a complete solution as it leaves unsolved the problem already discussed in connection with the doctrine of substitution. The employer who has contracted with an A. F. of L. union may rely not only upon the local union but upon the international union as well. It is just to require him to look solely to his employees and the local union for performance of the contract?

The suggestion has also been repudiated by certain writers who are of the opinion that the rights created by collective labor agreements are not given to workers as such, but to workers who are members of a particular union, so that the rights belong actually to that union and its members and not to the individual employees considered apart from their union membership.[136]

[134] *Supra* note 130.

[135] Note (1940) 38 MICH. L. REV. 516.

[136] Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 MICH. L. REV. 1109 (1941).

None of these problems can be easily answered since they involve a balancing of the interests of the three groups, the public, the workers, and the employers. It seems reasonable to require that the contract should continue for one year, during which time it should be a bar to certification of another union as bargaining agent. After that time the employees should be free to select a new representative if they so desire. After a certification of the new bargaining agency, the old contract should continue in force under the substitution doctrine only so long as is necessary for the new agent and the employer to reach a satisfactory agreement. Upon the execution of the new contract, the former agreement should be automatically revoked. This offers a continuity in labor conditions so that the public will not suffer by reason of unnecessary labor disputes, the employees will be assured of having a union which truly represents them, and the employer will have an opportunity of modifying the agreement to the extent that he feels necessary because of the change in affiliation of his workers. Difficulties will remain, of course, if the new union and the employer are unable to agree on a collective bargain, in which event the old contract will continue with the new union substituted for the old.

All of this discussion has turned upon the hypothesis that the original contract was valid. Of course, that is not always the case. The agreement may be with a company union or a minority organization, or may be the result of some unfair labor practice. These problems must be left to be dealt with directly in a discussion of unfair labor practices under the N. L. R. A., and it is sufficient to note here that if such facts are proved the validity of the bargain itself will be doubtful.

There still remains one question to be mentioned, and that is whether a collective agreement may be enforced through resort to the National Labor Relations Board. It has been argued that the purpose of the National Labor Relations Act was merely to protect and assure the right of collective bargaining. Under this doctrine, once the employer and the union have settled their differences and formulated an agreement the work of the Board is concluded. This exact question was presented to the court in the *Newark Morning Ledger case.*[137] The contract there in question contained a provision against discharge of employees because of union activities. The agreement was a valid collective bargain. Upon the discharge of an employee for alleged union activities an action was brought against the employer before the Board charging it with an unfair labor practice. The importance of the case lies in its holding as to the jurisdiction of the Board and the right of the public to prevent unfair labor practices, although to do

[137] N. L. R. B. v. Newark Morning Ledger, 120 F. (2d) 262 (C. C. A. 3rd, 1941). Note (1941) 18 N. Y. U. L. Q. 295.

so incidentally protects a private right which could be enforced through judicial proceedings. But for our purposes, the *result* is of interest, for the court held the employer's action to be an unfair labor practice. While a breach of just any clause of a labor contract will not confer jurisdiction on the Board, since a breach of the contract is not in itself an unfair practice under the federal law, the case does signify that certain clauses, if breached, may be enforced indirectly through proceedings before the Board. At times this will be of great importance to the employee—for example, if he resides in a jurisdiction which follows the rule that there must be an express adoption or ratification of the agreement by the employee before he can avail himself of its provisions, and he had not made any such ratification, he may still enforce parts of the collective contract in his behalf by resort to the N. L. R. B. Furthermore, proceedings before the Board may often be the only adequate relief, since an award of damages would not compensate for the rights lost.[138]

CONCLUSION

Today the effect given to the collective contract is much more complete than that given to the collective gentlemen's agreement of a few decades ago. The tendency of the modern cases is toward the recognition of a valid contract between the union and the employer, but creating rights in the individual employee as well. The old theories of agency and usage are being applied less frequently as the third party beneficiary doctrine is accorded greater acceptance. But it is still necessary to evaluate this contractual approach to determine if that is the desired solution.[139]

The failure of the contract rationale to solve the difficulties of modification, to impose liabilities upon a third party beneficiary, or to

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[138] Note (1941) 51 YALE L. J. 501.

See also, In re Lehrman et al., 5 LABOR CASES ¶ 60, 756 (Penn., 1941) This was a state court decision where it was said in reference to the problem of breach of contract and unfair labor practices:

"While the Board has no jurisdiction to enforce the contract its power to deal with the unfair labor practice is exclusive, even though an action for breach of contract may be brought in the courts at the same time."

The court concluded that the breach of the contract of itself was not sufficient to give the Board jurisdiction, unless the act complained of was also an unfair labor practice.

[139] "Collective agreements were conceived to meet adequately the needs of a new social situation and are *sui generis*. They involve a three-party or four-party relationship, with some of the parties having a shifting personnel of many individual members. The common law was never designed to govern multiple-party relationships, nor did it contemplate jurisitic personality with a shifting membership other than by incorporation. It is apparent, therefore, that an attemped application of two-party contract rules with the rights and duties flowing therefrom is fraught with insurmountable difficulties when applied to a social situation involving multiple party relationship." Anderson, *Collective Bargaining Agreements*, 15 ORE. L. REV. 229, 250 (1936).

answer the troublesome questions raised by the National Labor Relations Act has been noted. And there are other circumstances in which the doctrine has failed to act as an effective cure-all for our labor problems. There is a need, then, for something additional, for a new approach to protect the rights of all the interested parties.[140]

Various suggestions have been made as to the proper solution. The possibility has been mentioned of treating the agreement between the union and the employer as a contract, which in turn creates a usage which enters into the individual employee's contract of employment. This provides a sufficient theoretical basis for the recognition of both the individual and collective rights created by the agreement.[141]

The analogy between a collective agreement and a minimum wage law offers another possible theory, similar in many respects to the one just mentioned. Like the "contract-usage blend" it too treats the agreement as a contract between the union and the employer, but the benefits thereof are automatically given to the employee who has no power under this theory to modify or waive them. It is in this latter respect that the two suggestions differ.

Following the lead of several foreign countries, there are also proponents of the doctrine of giving a normative effect to the collective bargain.[142] Although perhaps differing in terminology from the minimum wage approach, the result is almost identical. The employee is unable to modify the collective bargain, and the right to contract separately is limited thereby. This view is suggested in the following language from the *Christiansen* case:

> "The contract between employer and union not only enters into the individual contract, but it circumscribes the rights of the employer and the members of the union with respect to making individual contracts of employment. It creates legal rights and duties which are independent of particular hirings."[143]

It may be contended that the collective agreement is a new type of relationship which can not be confined successfully within the bounds of common law concepts and terminology. The interpretation of the agreement should be flexible so that in each case the true intent and purpose of the contract can be effected. Perhaps, then, the courts should not attempt any rationale or set legal analysis to determine the validity of such agreements, but should, instead, strive in each case to carry out the purposes of the bargain.[144] The normative

[140] Note (1931) 31 COL. L. REV. 1156, where the writer suggests that the third party beneficiary doctrine is the best approach and that the courts should not attempt to apply new concepts to this problem.

[141] Note (1932) 41 YALE L. J. 1221.

[142] Note (1941) 50 YALE L. J. 695.

[143] *Supra* note 56, at p. 171.

[144] Suggested in 15 ORE. L. REV., *supra* note 139.

rule or the minimum wage analogy seem to come closest to reaching the ideal solution. It is true that the individual right to contract is greatly limited by either approach, but that merely amounts to a surrender of a theoretical right in return for greater collective strength. Since our national policy has been to favor the execution of these agreements, and since economic peace is more easily assured through their recognition and enforcement, the courts, it would seem, would be amply justified in adopting either of these two approaches. The benefit to the worker can not be doubted, and the savings to the employer and to the nation as a whole through the elimination of industrial strife should provide sufficient impetus toward cutting through the limitations of strict and technical legal reasoning and giving to these agreements the fullest measure of recognition and support.